

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2004-547

October 8, 2004

CENTRAL MAINE POWER COMPANY  
Request for Approval Power Purchase  
Agreement of Benton Falls PPA Settlement  
& Finding of Prudency and Request for  
Protective Order

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

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**I. SUMMARY**

We grant Central Maine Power Company's (CMP's) request to approve a settlement of a power purchase agreement (PPA) dispute with Benton Falls Associates (Benton Falls) and find that CMP was prudent in its management and proposed settlement of the litigation with Benton Falls.

**II. BACKGROUND**

CMP and Benton Falls are parties to a PPA under which Benton Falls generates and sells electricity to CMP at Benton Falls' 4.3 MW hydro facility located in Benton, Maine. The PPA was entered into in 1984, and deliveries commenced in 1987. The PPA will expire on December 31, 2007, or 20 years from the last day of the month when deliveries first occurred under the PPA.

When the PPA was executed in 1984, Benton Falls was placed in CMP's so-called "second decrement." At that time, the Commission had only established second decrement avoided cost rates for a 15-year period and so the second decrement avoided cost rates were established only through 1998. Thus, the PPA rates through 1998 were calculated based on a percentage of the second decrement avoided costs, and the rates after 1998 were to be determined as a percentage of second decrement rates when established by the Commission in the future. In particular, the PPA (as amended) states:

For the period beginning January 1, 1999 and ending December 31, 2007("Period Two"), the annual Base Rate for determining Rate A, Rate B and Pure Rate C for each calendar year shall equal 75% of the so-called "standard long-term avoided costs" established by the Maine Public Utilities Commission for the decrement which includes the second 50 megawatts and expressed in cents per kilowatt-hour, as established for each of the years through December 31, 2007 . . . .

In Docket No. 85-132, the Commission set avoided costs for CMP's second decrement for the years 1999 and 2000. These avoided costs were used to calculate the Base Rate in the PPA for 1999 and 2000 and were incorporated into the Second Amendment to the PPA, which was entered into on or about May 15, 1989. As of the date of the Second Amendment, the PPA still required Base Rates for the years 2001-2007 to be set sometime in the future.

In the middle of 2000, CMP and Benton Falls had discussions regarding the rates under the PPA beginning in 2001. CMP and Benton Falls had vastly different views as to when the Commission established standard long-term avoided costs rates for the second decrement. Benton Falls asserted that the Commission set the second decrement rates when it established the decrement 87-B avoided costs in Docket No. 87-261. CMP contended that the Commission explicitly declined to set the so-called "out year" (those that would be applicable to Benton Falls) rates in Docket No. 87-261 and that the standard rates for energy and capacity purchases established by the Commission for CMP pursuant to Chapter 360, § 4(C)(3)(d) of the Commission's rules should be used to calculate the Base Rate under the PPA. This difference in the parties' positions represented a significant difference in rates. For example, in 2001 CMP's interpretation of the PPA would result in a Base Rate of 2.34 cents per kWh, while Benton Falls' interpretation would result in a Base Rate of 6.25 cents per kWh.

In January 2001, after CMP refused to pay Benton Falls prices indexed to Decrement 87-B, Benton Falls filed a complaint in the Superior Court requesting a declaratory judgment to determine CMP's obligations under the PPA and claiming monetary damages for breach of contract. CMP filed a counterclaim, seeking a declaratory judgment that Decrement 87-B rates did not apply to the PPA and that the rates set by the Commission under section 4(C)(3)(d) of Chapter 360 were instead applicable.

On August 7, 2002, the Superior Court decided that the PPA unambiguously supported Benton Falls' interpretation of the contract and granted a summary judgment in favor of Benton Falls. CMP appealed the Superior Court's decision to the Law Court. The Law Court vacated the summary judgment, finding that the PPA is ambiguous on the issue of which avoided costs the parties intended to use as the index for the 2001-2007 rate calculation. The Court remanded the case back to the Superior Court Justice that granted the summary judgment for a trial on the merits. *Benton Falls Associates v. Central Maine Power Company*, 2003 ME 99, 828 A.2d 759.

The Superior Court Justice required Benton Falls and CMP to participate in a mandatory judicial settlement conference on June 26, 2004, at which they were able to reach a settlement agreement. Benton Falls and CMP agree that:

1. for the disputed period, 2001-2007, the Base Rate under the PPA will be calculated based on the standard rates for energy and capacity purchases established by the Commission for CMP pursuant to Chapter 360, § 4(C)(3)(d) of the Commission's Rules (CMP's position);
2. CMP will pay Benton Falls a fixed amount of money in settlement of all claims under the PPA; and,
3. the Commission must approve the settlement and find that CMP acted prudently in managing the litigation and entering into the settlement.

On August 13, 2004, CMP filed a request with the Commission seeking approval of the settlement agreement. By procedural order, the Examiner made all parties to CMP's stranded cost proceeding (Docket No. 2004-339) parties to this proceeding. A technical conference was held on September 15, 2004, at which the Advisory Staff asked CMP about the PPA dispute and the settlement. The conference included an *in camera* session in which Staff questioned CMP's attorneys about its litigation strategy and reasons for entering into the settlement. By letter on September 24, 2004, CMP informed the Commission that all other parties to this proceeding do not object to a Commission order that approves the settlement and finds CMP prudent.

### III. DECISION

We have reviewed the significant pleadings and court orders from the litigation. Based on that review, we find that CMP's management of the litigation has been prudent.

By CMP's analysis, the settlement payment represents an amount very close to fifty percent of CMP's best estimate of the additional cost it will incur if Benton Falls wins in litigation rather than if CMP wins. CMP's analysis, including its assumptions, appear reasonable.

We agree with CMP that it faced significant litigation risks, as well as litigation costs, if the dispute proceeded to trial. We also agree that CMP was reasonable in agreeing to a mid-range settlement between the two litigating positions. We therefore approve the settlement agreement because, by entering into the agreement, CMP has reasonably mitigated its stranded costs associated with the Benton Falls PPA.

Dated at Augusta, Maine, this 8<sup>th</sup> day of October, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Diamond  
   Reishus

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.